



Native American Finance Officers Association

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## TESTIMONY OF WILLIAM LOMAX, PRESIDENT

### NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION

#### SENATE COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARING ON THE *CARCIERI* CRISIS: THE RIPPLE EFFECT ON JOBS, ECONOMIC DEVELOPMENT AND PUBLIC SAFETY IN INDIAN COUNTRY

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#### Introduction

Chairman Akaka, Vice Chairman Barrasso, and honorable members of the Committee on Indian Affairs, good afternoon and thank you for this opportunity to testify. My name is William Lomax and I currently serve as President of the Native American Finance Officers Association, “NAFOA”. I am a member of the Gitxsan Nation. I hold a graduate degree from Columbia Business School and a law degree from the University of British Columbia Law School. I testify today in my official capacity, as well as a concerned business person and tribal member. The destructive impact that the Supreme Court’s decision in *Carcieri v. Salazar* has had on economic development within Indian Country during the two-and-a-half years since the case was handed down is real, and for some tribes has been particularly harmful.

NAFOA is a national not-for-profit organization that focuses solely on the financial success of tribal entities. Our membership includes tribal finance officers, controllers, accountants, auditors, financial advisors, tribal leaders and more. NAFOA provides a central conduit for our membership to raise their concerns and to share economic insights and best practices.

Because of the role we play in the tribal commercial and financial community, we have a pretty good sense of the impact that the *Carcieri* decision has had on many tribes. The great uncertainty caused by that decision is preventing tribes from every part of the country from growing and diversifying their economies, engaging in economic development, and creating new jobs. *I want to underscore that last point – Carcieri is killing jobs in Indian Country, and it is killing jobs in the local non-Indian communities which neighbor Indian Country.*

#### The Genesis of the *Carcieri* Uncertainty

As you know, the Supreme Court held that the Indian Reorganization Act (“IRA”) applies only to tribes that were under federal jurisdiction when that Act was passed in 1934. When in *Carcieri* the Court made a distinction between tribes which were “under federal jurisdiction” in 1934 and those which were



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not, the Court created a distinction among tribes that had never before existed. Prior to that time, it was well established and well accepted that the IRA applied equally to all federally recognized tribes.

Not only did the Supreme Court effectively create two unequal classes of tribes, but it also failed to address the question of what “under federal jurisdiction” means. There is no federal statute that defines what it means. Nor does the Department of the Interior have an administrative regulation to define what it means. No one had ever thought much about this question because, between 1934 when the Act was passed and 2009 when the Court handed down its decision, no one ever interpreted the IRA the way the *Carcieri* Court did.

So which tribes are precluded from acquiring trust land under the IRA? No one knows exactly, because no one single common definition of “under federal jurisdiction” has been agreed upon and accepted by the courts or by the Department. Some anti-Indian litigants are arguing in court today that *any* tribe that was not federally recognized in 1934 is a tribe that was not under federal jurisdiction, and therefore is precluded from the benefits of the IRA. You might ask me how many tribes recognized today were unrecognized in 1934? We can’t even give you that number, because there was no official list of federally recognized tribes in 1934.

As you can see, exactly which tribes are “*Carcieri* tribes” and which are not is about as clear as mud.

### **The Practical Effect of the *Carcieri* Uncertainty**

You do not need a business degree to understand that banks and other investors are hesitant to lend money where they perceive risk. The more risk, the higher the cost (i.e., the higher the interest rate) of the loan. And of course if the risk gets too high, reputable banks and investors simply stop lending.

There already are multiple inherent hurdles to private investment in Indian Country. Tribes lack access to the tax-exempt market non-tribal state and local governments enjoy. Lack of investor familiarity with waivers of sovereign immunity and tribal jurisdictional issues often add to borrowing costs. As others have testified before Congress on this same issue, historically, bank and securities markets have been quick to narrow borrowing options in response to general uncertainties and perceived credit risk when dealing with tribal governments.

The insertion of the *Carcieri* uncertainty into the mix, however, has all but killed off the investment community’s willingness to invest in projects involving tribes that even *might* have a *Carcieri* problem. Fewer and fewer reputable lending institutions and fewer and few reputable private investors are willing to take the risk of lending money to a tribal economic development project because even the most savvy investor has no real way to determine whether some tribes will fall within, or outside of, *Carcieri*’s new “under federal jurisdiction” test.

I want to underscore that while this problem was originally thought to be borne only by newly recognized or restored tribes trying to acquire new trust lands, even tribes with established economic development enterprises on existing tribal lands are finding that the status of their land may become subject to increasing scrutiny and challenges because of recent court decisions which seem to call into question whether the Quiet Title Act shields land that is already held in trust. If the end result of this line of cases is that somehow land can removed from trust status because of *Carcieri* issues, tribal economies will be devastated, debt service will stop, and employees will be let go.



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## Conclusion

The hurdles to economic development and job creation in Indian Country already are significantly higher than they are for main-stream America. If we fail to address the *Carcieri* problem, we condemn an unknown number of tribes to second-class status and to perpetual economic hardship and unemployment. Of all of the hurdles to economic development and job creation in Indian Country, the uncertainty caused by *Carcieri* should be the easiest and most straightforward hurdle that can be removed. NAFOA and its members urge the Congress to act as swiftly as possible to make clear that the benefits of the Indian Reorganization Act apply equally to all federally recognized tribes.

I thank you for your time today and the opportunity to testify before this prestigious Committee. I am happy to answer any questions that you may have.